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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-345

R. J. REYNOLDS TOBACCO COMPANY, *et al.*,

*Petitioners,*

v.

AMERICAN PRESIDENT LINES, LTD., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF IN OPPOSITION. ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO; and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO

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### Opinions Below

The opinion of the Court of Appeals is not yet officially reported (Pet. App. A). The decision of the Federal Maritime Commission is also not yet officially reported (Pet. App. B).

### Jurisdiction

The judgment of the Court of Appeals was entered on June 28, 1974 (Pet. App. 1a). The petition for a writ of

certiorari was filed on September 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented

This case does not present the issues which the Reynolds petition suggests. The Agreement approved by the Federal Maritime Commission is a discrete stock acquisition with no ongoing inter-carrier arrangements of the type described in Section 15 of the Shipping Act and falling within the regulatory jurisdiction of the Commission. The Court below carefully analyzed each of the "conditions" specified in the Commission's order and correctly concluded that none confers Section 15 jurisdiction.

A future case may well pose the question of Commission jurisdiction over an agreement containing a discrete merger or stock acquisition combined with ongoing Section 15-type arrangements between carriers limiting or restricting competition. This case does not.

The issues presented, therefore, are:

1. Does the Federal Maritime Commission have jurisdiction to approve a stock acquisition agreement under which the sole owner of the largest container shipping company in the world acquires all the stock of the second largest container shipping company in the world?

2. Can the Federal Maritime Commission acquire jurisdiction over such an agreement by inserting purported "conditions" which are not themselves the type of ongoing cooperative working arrangement between carriers falling within the Commission's regulatory jurisdiction.

## Statute Involved

Section 15 of the Shipping Act, 1916 (46 U.S.C. §814), the relevant statute, is set forth at Pet., pp. 3-4 and Pet. App. E.

## Statement of the Case

Sea-Land Service, Inc. ("Sea-Land") is the largest container shipping line in the world; United States Lines, Inc. ("USL") is the second largest. For several years Sea-Land has been a wholly-owned subsidiary of R. J. Reynolds Tobacco Company ("Reynolds"). The agreement in issue would permit Reynolds to acquire all the stock of USL; and if such an agreement were held to fall within the Commission's jurisdiction, then the acquisition would be immune from the reach of the anti-trust laws. Thus the largest and second-largest companies in the world in a major transportation industry would come under the sole control of a common parent.

Originally, the stock acquisition was accompanied by a twenty-year charter under which all of the USL container fleet and supporting equipment would be chartered to Sea-Land with an option to acquire title at the end of the twenty-year period. The lengthy hearings before the Commission concerned the anticompetitive consequences and alleged transportation benefits of common managerial control, through Sea-Land, of the combined fleets.

The Commission's Chief Administrative Law Judge recommended disapproval of the merger-charter and issued a lengthy report with extensive findings and conclusions as to why it was antithetical to the public interest. In final oral argument before the Commission, the Reynolds—Sea-Land attorney proposed an entirely new

arrangement which had never been litigated in the hearings: approval of the stock acquisition, disapproval of the twenty-year charter, and operation of the two mammoth lines as separate companies by Reynolds.

The Commission's ultimate decision embraced this proposal. The findings and conclusions of the Chief Administrative Law Judge were adopted in full, the charter was disapproved, and Reynolds' acquisition of all the USL stock was approved. As "conditions" to its order, the Commission ordered Reynolds to operate the two companies as competing entities, to maintain their corporate separation as subsidiaries of Reynolds, to avoid interlocking directorates, and to report to the Commission periodically on its adherence to these conditions (31a-34a).

Thus the allegedly ongoing features of the twenty-year charter, on which the petition so extensively dwells, are utterly inadvertent. The Commission's order disapproved the charter *in toto,* and petitioners formally modified their agreement to conform to that order. The charter is now dead and cannot be resuscitated for the sole purpose of giving substance to the Commission's jurisdictional claims.

At the time of the Commission's order, this Court had not decided the *Seatrain* case, *Seatrain Lines, Inc.* v. *Federal Maritime Commission,* 411 U.S. 726 (1973). The Commission premised its jurisdiction on the theory, since rejected by this Court in *Seatrain,* that Section 15 extended to mergers and acquisitions (Pet. App. 90b-117b). Later, in seeking to defend its decision in the Court of Appeals, the Commission and those parties aligned with it put forth the argument that the so-called "conditions" constituted "ongoing" obligations necessitating continuing supervision by the Commission and sufficient to bring the entire acquisition with the Commission's jurisdiction.

The Court of Appeals, after thorough analysis of this Court's decision in *Seatrain* and the report of the Commission, had no difficulty in distinguishing between the tail and the dog. The Court of Appeals held that the agreement approved by the Commission represented a discrete acquisition, that the conditions were minimal and trivial compared to the magnitude of the acquisition itself, and that the conditions do not "impose substantial ongoing responsibilities requiring continuous Commission supervision" (Pet. App. 23a). Moreover, held the Court, the conditions themselves do not constitute the kind of anti-competitive working arrangement between carriers which Congress has entrusted to the Commission's regulatory jurisdiction under Section 15 of the Shipping Act. Thus, under no reading of the *Seatrain* decision, did the Commission have jurisdiction to approve the agreement which it had fashioned.

## Argument

1. The decision below correctly reads this Court's recent holding in *Seatrain* and properly applies it to the acquisition agreement approved by the Commission herein. If the Commission lacks jurisdiction over the acquisition by one carrier of vessels owned by another, it certainly lacks jurisdiction over the acquisition of the second largest container shipping line in the world by the owner of the largest line. For if essentially meaningless and trivial conditions of ostensible "on-going" obligations can be inserted in an agreement of this magnitude, either by the parties themselves or by the Commission, and thereby overcome the *Seatrain* ruling, then that ruling is impotent indeed. And the underlying principle emphasized in *Seatrain* that "exemptions from anti-trust laws are strictly construed" will be so easily evaded as to make a mockery of Congressional purpose.

2. Moreover, the Court below properly held that the Commission's "conditions" were not the kind of ongoing anticompetitive cooperative arrangements between carriers which Section 15 entrusts to Commission regulation.

In *Seatrain* the Court spoke of "ongoing rights and responsibilities which therefore necessitated continuous Commission supervision" (411 U.S. at 729). This statement appeared in the context of a consideration of the scope of Section 15 of the Shipping Act, the pertinent source of Commission jurisdiction. In specific reference to Section 15, and as explanation for its ultimate conclusion, the Court observed: "The statute thus envisions a continuing supervisory role for the Commission and invests it with power to disallow an agreement after a period of time even though it had initially been permitted. But is hard to see how the Commission can exercise this supervisory function when there are no continuing obligations to supervise" (411 U.S. at 735).

These and other similar portions of the *Seatrain* opinion make clear that when the Court spoke of "ongoing responsibilities" and "continuing obligations" it had in mind responsibilities and obligations embraced within the scope of Section 15. For only Section 15-type obligations, created by a Section 15 agreement, gives rise to Commission jurisdiction and to the "continuing supervisory role" envisioned by both the statute and the *Seatrain* decision.

Thus, before it can even be claimed that ongoing responsibilities and obligations remove an agreement from the category of "discrete" and thereby create Commission jurisdiction to confer antitrust immunity, there must be Section 15-type responsibilities and obligations. This means that they must arise out of an agreement between carriers of water or other persons subject to the Act and

that the agreement must control, regulate, prevent or destroy competition or provide for an exclusive, preferential or cooperative working arrangement.

The "conditions" herein wholly fail to meet this threshold test in two critical respects. First, they are not agreements between carriers at all, but unilateral commitments by Reynolds, an non-carrier, with regard to its management of USL. Second, they are not agreements "controlling, regulating, preventing or destroying competition," the kind of anticompetitive working agreement described by Section 15.

The principal "conditions" merely enjoin Reynolds to operate its two subsidiaries as competing entities, with separate military bids and conference participation, unless otherwise approved by the Commission. These "conditions" amount to nothing more than a pledge of adherence to the statutory provisions embodied in Section 15: that Sea-Land and USL make no agreements or arrangements limiting, preventing or regulating competition without Commission approval. This command would be binding on them through direct operation of Section 15 itself, without any mention by the Commission or inclusion in the Commission's order. As the Court below correctly held, the Commission does not acquire jurisdiction over acquisitions and mergers by characterizing as "conditions" the mandates of Section 15 (Pet. App. 23a-26a).

The remaining "conditions" prohibit Reynolds from selling or encumbering USL stock or assets or changing the inter-corporate relationship of Reynolds, RJI and USL; prohibit USL from declaring dividends except out of net operating profits for the preceding year; and require Reynolds to assume USL's existing debts (a discrete event). None of these conditions relates to ongoing responsibilities or obligations under a consensual relationship

between persons subject to the Shipping Act, and none has the effect of controlling, regulating, preventing or destroying competition. None, therefore, gives rise to the Commission's "continuing supervisory role" under Section 15.

The same applies to the managerial limitation on placing common directors in USL and Sea-Land and the requirement that USL and Sea-Land each have a "public director." These, too, involve no Section 15-type responsibility or obligation.

The "conditions" contained in the Commission's order herein contrast sharply with those presented in the cases cited at pages 16-17 of the petition. Covenants not to compete, joint ventures between carriers, and leases with exclusive or preferential features are the very kind of ongoing agreements restricting or limiting competition that fall squarely within Section 15 of the Act. The "conditions" herein have none of these elements.

Thus, this case simply does not present any issue of accommodating the Commission's jurisdiction over the ongoing nature of Section 15 agreements with its lack of jurisdiction over acquisitions and mergers that may be embodied in the same instrument or arrangement.

3. In the Court of Appeals, petitioners contended that even if the agreement approved by the Commission is of the type held to be outside Commission jurisdiction in *Seatrain*, the originally filed agreement which included the twenty-year charter did contain ongoing Section 15 obligations; and since the Commission is empowered to modify agreements as a condition of their approval, the disapproval and elimination of the charter did not operate to divest the Commission of jurisdiction to approve the discrete acquisition that remained. We cannot tell from a reading of the petition whether petitioners are still pressing

this contention; and in an abundance of caution we will deal with it.

The argument flies in the face of common sense as well as the express holding of this Court in *Seatrain*. If inclusion of outrageously inappropriate, but technically "ongoing" provisions in a filed acquisition or merger agreement are sufficient to allow Commission jurisdiction to attach and remain, irrespective of their disapproval and removal, then *Seatrain* means nothing.

The entire thrust of the *Seatrain* decision focused on the danger of permitting antitrust immunization except where Congress has clearly so intended and the need for strict construction of exemptions from antitrust standards. Based on this principle, the Court concluded "that in enacting §15, Congress did not intend to invest the Commission with the power to shield from antitrust liability merger or acquisition of assets agreements which impose no ongoing responsibilities" (411 U.S. at 729).

Yet that is precisely the power for which petitioners have contended. Their argument asserts that if the filed agreement is broad enough, the Commission has "power to shield from antitrust liability" a discrete merger or acquisition of assets. This runs counter to the basic holding of *Seatrain*.

The Court below correctly and convincingly disposed of the contention in the following terms (Pet. App. 29a-30a):

> "The difficulty with this argument is that it would allow the Commission to take jurisdiction over one agreement, transform the agreement into an outright merger and then approve the outright merger. This circuitous procedure would enable the Commission to escape the Supreme Court's holding in *Seatrain* that the Commission lacks jurisdiction over outright mergers. In

our view the Commission's jurisdiction must be measured by the agreement actually approved, not by an agreement which was proposed but discarded."

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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